International Business Machines Corporation *and* **Richard Hudson.** Cases 2-CA-17141 and 2-CA-17246

December 6, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, for the reasons set forth below.

In adopting the Administrative Law Judge's Decision, we note that the General Counsel conceded that the Respondent's sole motive for discharging Hudson was Hudson's knowing breach of its confidentiality rule. Also, there is no allegation or evidence that Respondent's policy of classifying its wage information was designed, instituted, or maintained for purposes which would contravene Section 7 of the Act.

The Administrative Law Judge noted that Hudson's distribution of wage data would, under ordinary circumstances, constitute protected concerted activity. We agree. It is well established that discussion of wages is an important part of organizational activity. Thus, to the extent that an employer's policy of classifying its wage information "muzzles" employees who seek to engage in concerted activity for mutual aid or protection by denying the very information needed to discuss wages, it adversely affects employee rights.[1] Nevertheless, it does not follow that the Respondent's policy is unlawful and cannot be enforced. For, in agreement with the Administrative Law Judge, we find that the Respondent has established substantial and legitimate business justifications for its policy.[2] The issue, therefore, is whether the interests of the Respondent's employees in learning and discussing each other's wages outweigh the Respondent's legitimate business interests in support of its policy so that, under the circumstances, Hudson's distribution of IBM's data would fall within the protective ambit of Section 7. We find that they do not. The Respondent does not prohibit employees from discussing their own wages or attempting to determine what other employees are paid. Rather, the Respondent merely has chosen not to inform employees what it pays others and the reasons therefor, and, in furtherance thereof, treats as confidential the information it has compiled for its internal use. The Respondent's policy does not itself bar employees from compiling or determining wage information on their own. Further, the record is insufficient to support a finding that the policy so adversely affects the employees' ability to do so that any attempt would be meaningless.[3]

This is not to say that the Respondent would be entitled to enforce its confidentiality policy by discharging any employee who disseminates its confidential wage information regardless of the circumstances. Here, however, Hudson knew that the documents he received had been classified by the Respondent as confidential and he was aware of the Respondent's rule prohibiting dissemination of such material. Nor did Hudson obtain the information under circumstances which would lead him reasonably to believe that his possession and dissemination of the material was authorized. Accordingly, we shall dismiss the complaint in its entirety.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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[1] See *Jeannette Corp.* v. *N.L.R.B.*, 532 F.2d 916 (3d Cir. 1976).

[2] *Texas Instruments Incorporated*, 237 NLRB 253 (1980), enforcement denied 637 F.2d 822 (1st Cir. 1981), is, therefore, distinguishable. There the Board found that a respondent had not established legitimate and substantial business justification in support of its rule prohibiting dissemination of a wage survey. The Board further found, unlike this case, that the respondent therein had released, at least to competitors, the information it sought to protect as confidential.

[3] As the Administrative Law Judge noted, Sec. 8(a)(5) obligates an employer to provide a collective-bargaining representative with wage information relevant to the appropriate unit. Contrary to our dissenting colleague, there exists no concomitant Sec. 7 obligation affirmatively to provide employees with wage information merely because such would facilitate activity leading to the choice of a representative.

[4] We have no disagreement with our dissenting colleague regarding the importance of eliminating racial discrimination and its relationship to Sec. 7 rights. However, Hudson's activity here fell outside the protection of Sec. 7 not because of his purpose or motive but, rather, because of his method. While Hudson may have "innocently" obtained the Respondent's confidential wage data, he did not "innocently" distribute it, and we see no reason to adopt what is essentially the "finders keepers" rationale advocated by the dissent. The fact of the matter is that Hudson knowingly distributed the Respondent's data, not his own.

MEMBER JENKINS, dissenting:

I do not agree that the Respondent's wage confidentiality policy, however legitimate, outweighs the employees' Section 7 rights.

The facts are that the Respondent operates on a "closed" pay system which treats job classifications, salary ranges, and other pay information as confidential.[5] Pursuant thereto, it compiled its 1980 salary guidelines for the use of its managers which it classified as "IBM Confidential" and which it distributed on a "need to know" basis.

Hudson, a longtime employee, also was president of the New York Chapter of the Black Workers Association (BWA), an organization of Respondent's employees concerned with promoting equal employment opportunities and eliminating racial discrimination at the Respondent. He also was editor of the BWA Newsletter. In February 1980, an anonymous source mailed Hudson several pages of the Respondent's 1980 salary guidelines. Although he was aware of the confidential classification of the document and of the Respondent's rule prohibiting the dissemination of material so classified, he also was aware that this was the precise type of information needed in furtherance of BWA's purposes. Accordingly, he prepared an extract therefrom which he distributed at a BWA meeting. The extract contained salary ranges for various jobs and the recommended timing and percentage of increases for certain salaries. Upon learning that he possessed the material, the Respondent informed him that he would be discharged if either he refused to turn it over to the Respondent or if he disseminated it. Hudson then set forth an account of that warning and of his distribution of the material in the BWA Newsletter and was discharged after telling the Respondent that he had distributed it.

Two facts are eminently clear: (1) Hudson obtained the information innocently, and (2) he disseminated it for the express purposes of invoking group action by BWA members to improve the wages of the Respondent's black employees and to eliminate alleged racial discriminatory employment practices against them. The majority agrees that Hudson's conduct is protected and concerted, and further concedes that the Respondent's confidential wage policy adversely affects the employees' Section 7 rights. Nevertheless, the majority balanced the conflicting employer-employee interests in favor of the Respondent, and thereby effectively inhibited the employees' statutory right to engage in collective action and, in substance, penalized them for utilizing lawfully acquired information for the purpose of proving and eliminating the existence of racial discrimination in the Respondent's employment practices.

It has been settled since *Steele* v. *Louisville-Nashville Railroad Co.*, 323 U.S. 192 (1944), that racial discrimination in employment, whether by unions or employers, is unlawful. It is equally well settled that the principles enunciated in *Steele* apply to actions arising under the National Labor Relations Act.[6] This judicial concept, moreover, was embraced by the Congress in the enactment of Title VII of the Civil Rights Act of 1964, so that national labor policy specifically forbids racial discrimination in the terms and conditions of employment.[7] The concept, however, is meaningless if employees are not permitted to inquire into the possible existence of racial discrimination because of a business policy, even if the policy is set in good faith, in order to eliminate discrimination if it exists—and this is precisely what Hudson and the employees were attempting to do.

I agree that there are many areas of conflict between employers and employees which may be balanced equitably in favor of one or the other, but protected concerted activity concerning racial discrimination is not one of them. When that is the basis for and the subject of the protected activity, there can be no legitimate business interest sufficient to suppress the activity. As I stated in my dissent in *Farmers' Cooperative Compress*, 194 NLRB 85, 90 (1971), "It is the divisiveness, induced and fostered among the employees by the 'clash of interests' which the employer's racial discrimination creates, which is the source of the unlawful restraint and interference with the employees' exercise of their concerted rights. The employees are forced to expend their time, effort, and money to eliminate a condition of employment based on invidious differentiation (race) which is unlawful and thus should never have existed."

Prohibiting protected concerted activity designed to inquire into and eliminate any such discrimination cannot be "balanced," and thereby legitimated, on any theory of preserving the Respondent's business practice or operation, for that practice itself clearly interferes (or may do so) with the employees' rights in this case. It is immaterial that "the Respondent does not prohibit employees from discussing their own wages or attempting to determine what other employees are paid."[8] My col-

[5] The basis for the confidentiality is the Respondent's contentions that such a rule allows it to attract, motivate, and retain employees by allowing managers to reward employees on performance alone without having to worry about creating dissatisfaction among other employees; inhibits competitors from stealing employees; and reduces resistance to transfers.

[6] *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248 (1944).

[7] Sec. 704(a), 42 U.S.C. Sec. 2000 (3)–3(a).

[8] It would seem that an extension of this reasoning to the ultimate is self-defeating, for if the employees followed the majority's prescription

Continued

leagues' reliance on this point is contrary to the purpose of the statute to permit employees to organize themselves freely for collective bargaining and other concerted activity even before the formation of or in the absence of a union. For the Administrative Law Judge notes, apparently with the majority's approval, that, although the wage information would be available to a collective-bargaining representative (which then could pursue BWA's purposes), it is not available to the employees because of the absence of such a representative and, moreover, although not available to them in this forum, "likely . . . could be discovered" by them through legal action or by means of a complaint filed with the Equal Employment Opportunity Commission. A union has, of course, an affirmative duty to eliminate racial discrimination in favor of equal treatment for all of its members, but the pursuit of such equality is not within the exclusive province of a union. If the information must be furnished to a union (as it concededly must) and need not be treated as confidential by a union or in some other forum, there is no reason to treat it so here. Nor need the employees be represented by a union in order to be entitled to the information; the information may make them decide to seek representation by a union, but their right to make that choice cannot be impeded by withholding the information.

Even accepting the applicability of the majority's balancing test, which I do not, my colleagues simply have not explained why Hudson's method of disclosure is unprotected in this forum if a required disclosure in a different forum can outweigh the precise business interests they find are not outweighed here.

The underlying concept in this case is no different from that in *Jeannette Corp.* v. *N.L.R.B.*, 532 F.2d 916 (3d Cir. 1976), where the court considered the company's rule prohibiting wage discussions among employees and found that the asserted purpose of limiting "jealousies and strife" was an unacceptable justification. As the court there said, "dissatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differential also provides the sinew for persistent concerted action." The purpose of Section 7 would be frustrated if employees are prohibited from using information on wages in furtherance of statutorily protected activity even in the absence of a collective-bargaining representative. Such a principle would also enable the Respondent to maintain in perpetuity unlawful racial discrimination by making "confidential" all data regarding such unlawful activity. The fact that the information was "the Respondent's data, not [Hudson's]," as my colleagues state, is irrelevant: so is all wage data or equal employment information.

Moreover, even assuming that confidentiality can exist where the same information would otherwise be available to employees (which I do not accept), any such confidentiality has been breached here. Thus, even on the "confidentiality" terms in which my colleagues frame the issue, the Respondent's justification for its action has disappeared.

My colleagues have taken too narrow a view of a broad picture. There is far more involved here than a simple "finders keepers" concept they have ascribed to me. Unfortunately, the result reached here assures the employees of suffering the consequences depicted in the remainder of that couplet—becoming "losers weepers."

Accordingly, I would find that the Respondent discharged Hudson because he engaged in protected concerted activity, in violation of Section 8(a)(1).

and, after such discussions, compiled the results into a comprehensive unified document, would the dissemination of that material breach the Respondent's policy so as to subject them to discipline? Hudson merely shortened that process.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in New York, New York, on November 12–14, 1980,[1] based on two unfair labor practice complaints, dated May 23 and 30,[2] alleging that Respondent International Business Machines Corporation violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, by threatening Charging Party Richard Hudson with discharge and later discharging him for distributing certain confidential information pertaining to the timing and amount of prospective wage increases. The General Counsel alleges that Hudson was engaged in concerted protected activities under the Act for which he could be neither threatened nor discharged. Respondent denies that it violated the Act in any way.

Upon consideration of the record herein,[3] including my observation of the demeanor of the witnesses, and of the briefs filed by the General Counsel and Respondent, I hereby issue the following:

[1] All dates herein refer to the year 1980, unless otherwise stated.

[2] The relevant docket entries are as follows: The unfair labor practice charge in Case 2-CA-17141 was filed by Hudson on March 18, and in Case 2-CA- 17246 on May 15. The two complaints were consolidated by the Regional Director for Region 2 on June 12.

[3] Both the General Counsel and Respondent moved to correct the official transcript in numerous respects. Neither opposed the motion of the other. Their motions are granted and the transcript is corrected accordingly.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

I. JURISDICTION

At all times material herein, Respondent, a New York corporation, with offices and places of business in various States throughout the United States, and a training center in New York, New York, has been engaged in the manufacture, nonretail sale, and distribution of computers, information-handling systems, and office and related products. During the calendar year 1979, Respondent derived gross revenues in excess of $1 million, of which in excess of $50,000 was derived directly from firms located outside the State in which it is located. I conclude, as Respondent admits, that it is now and has been at all time material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, being in a highly competitive industry, with rapid technological change and emphasis on new product development, maintains strict controls on the use of its internal documents, insisting that all employees sign upon their hire an agreement not to disclose to anyone outside of Respondent or use in other than Respondent's business any confidential information, either during or after employment, except with Respondent's written permission. Hudson signed such an agreement when he was first employed in August 1963 and soon after his hire became aware that salary information, which included an employee's level of employment, salary range, and projected increases and timing thereof, was confidential material, which under Respondent's rules was restricted to those individuals with a need to know the information in connection with their job responsibilities.

If Hudson had forgotten his 1963 commitment, he should have been reminded of it in 1973, when he was given in a legal proceeding[4] a document marked "IBM Confidential" and essentially indentical in format with the one he is accused of distributing. In late 1973, Hudson instituted a Federal civil action against Respondent, charging it with discrimination in employment,[5] in which similar documents; shortly before the trial, pursuant to his counsel's motion to permit him to consult with his client in preparation for trial, subject to the court's admonition that, although Hudson could examine the documents in preparing his counsel for trial, counsel was to advise Hudson of the confidentiality of the documents and the limited use that Hudson could make of them; and, finally, at trial, when Hudson reviewed the documents but was admonished not to use them for any purpose other than the trial. Further, in 1977, Hudson was given a document setting forth Respondent's security classifications, which included advice that confidential documents were to be "sent or shown only to those employees with *an established 'need-to-know'*, either because they are required to take action or must be kept informed."[6]

I am satisfied that, when in February 1980, Hudson received in the mail two pages of Respondent's 1980 salary program guidelines, he knew that he had, to use the vernacular, a "hot potato." In fact, his lack of having this material in years past caused him to complain that the guidelines were being withheld from employees' views so that, *inter alia*, Blacks could be discriminated against. Also, knowing that dissemination of the confidential material could result in discipline, Hudson had previously advised members of the National Black Workers' Alliance of IBM Employees (BWA)[7] that, if they obtained any material, they should submit it to him anonymously so that they could not be pinpointed for discipline.[8] Hudson retyped the information on the two sheets, correlated the monetary figures thereon with job levels and position titles that he had learned of over the years (the levels and titles were also confidential information), and inserted them in a draft newsletter which he distributed to at least three other members of BWA.

On March 7, he distributed 15 copies of a handout at a BWA meeting in Washington. The material contained salary ranges for various job levels and recommended timing and percentage increases for salaries extracted from the guidelines. On March 17, Thompson told Hudson that Respondent knew that Hudson had confidential salary information. When Hudson admitted that he had, and that he was trying to figure out what to do with it, Thompson directed him to return the material by the following morning and that, if he did not, or if he disseminated it, he would be subject to dismissal.

The following morning, March 18, Hudson brought the two pages to Thompson, along with a letter he prepared, allegedly memorializing his conversation with Thompson the prior day and setting forth Hudson's defense. Thompson, too, had a letter for Hudson, confirming his conversation of the prior day and specifically advising Hudson that:

> . . . you are to see that these IBM confidential documents are not published or given unauthorized distribution. If you fail to comply with either of these directives [the other being to return the documents], you will be subject to dismissal from IBM.

Hudson made no mention, either orally or in his letter, of the fact that he had already distributed this material,

[4] Hudson filed a charge against Respondent with the New York Division of Human Rights.

[5] Hudson was unsuccessful. *Hudson* v. *IBM Corp.*, 22 FEP Cases 947 (S.D.N.Y., 1979), affd. 620 F.2d 351 (2d Cir. 1980), cert. denied 49 U.S.L.W. 3443 (1980).

[6] Although I have not credited Hudson, I note his testimony that he had been advised by his managers that he was not allowd to discuss even his own salary with anyone else.

[7] BWA has a membership of approximately 1,700–1,800 present and former employees of Respondent who are affiliated with six regional chapters in the eastern United States. Its principal object appears to be the establishment of employment opportunities and economic parity of Black employees with other employees of Respondent and, concomitantly, the prevention of racially discriminatory employment practices. Hudson is president of the New York chapter and editor of its newsletter, which attempts to educate its members about Respondent's alleged discriminatory practices.

[8] The two pages had been trimmed to remove any markings that might reveal where they had been photostated.

nor did he comment that he had prepared a draft newsletter containing the confidential information. However, when Thompson asked him whether he had returned all the material, Hudson admitted that his brother had one copy; and Thompson, soon after the meeting, directed Hudson to retrieve it immediately. Hudson traveled to his brother's house, allegedly ascertained that his brother never had the material, and returned to Thompson to inform him that there was no other copy.

Because of Thompson's warning, Hudson revised his BWA Newsletter, inserting an article about the warning he received, which included an admission that he had distributed the material on March 7. When the newsletter was brought to Thompson's attention, Thompson met with Hudson on May 14 to confront him with the prior distribution. Hudson admitted it; and, on May 15, Thompson terminated Hudson's employment.

B. *Credibility*

In the recitation of facts, wherever there has been a conflict in the testimony, I have credited principally the witnesses called by Respondent. Although Hudson appeared to be well-intentioned, he nonetheless was lacking in candor, often giving answers which contradicted his investigatory affidavits and which were inconsistent, self-serving, imaginative, improbable, and evasive. In particular, I am entirely skeptical of Hudson's unsatisfactory and improbable recounting of his visit to his brother to recapture the confidential wage information. In discrediting Hudson, I have also considered the difference between his testimony of his March 17 conference with Thompson and the letter he gave to Thompson the following day; Hudson's self-serving explanation that he could distribute the confidential information to his fellow employees because they had a "need to know" it under the Act, whereas Respondent's rule concerning dissemination could not reasonably be so construed; similarly, his averment that he thought distribution was permissible, despite the fact that he took inordinate precautions to ensure the anonymity of his sources of the material; and his denial that he read Respondent's documents during the legal proceedings, when it is obvious that he had been attempting to obtain this information for years and that he was so thoroughly immersed in the issues involved herein that he conducted legal research in order to ensure his right to the salary information.

At the hearing, the General Counsel contended that Respondent's rule was ambiguous and that Hudson did not understand its full import. Assuming, as a matter of law, that said facts are sufficient to support a conclusion that Hudson should not have been discharged,[9] I specifically find that the rule was not ambiguous and that Hudson, in any event, clearly understood that he was entitled neither to possess the confidential guidelines nor to disseminate them.

[9] The General Counsel's brief seemingly abandons this theory. It should be briefly noted that an employer may discharge an employee for good reason, for bad reason, or for no reason at all, as long as the true motivation for the employer's action is not in violation of the Act.

C. *Discussion*

The legal authority relating to this issue is scant. In *Jeannette Corporation*, 217 NLRB 653 (1975), the Board held that an employer violated Section 8(a)(1) of the Act by enforcing its rule prohibiting employees from discussing their wage rates among themselves. These discussions constituted concerted protected activities because they were engaged in to promote group action seeking to improve wages, a basic right under the Act. Respondent's rule herein does not prohibit employees from talking to other employees about their own wages, and the General Counsel (despite Hudson's discredited testimony) makes no contention that Respondent has violated the Act in this respect. Nor does *Jeannette* deal with an employer, like Respondent, which reveals no wage information to its employees.

However, *Jeannette* becomes important because, on enforcement, the Court of Appeals for the Third Circuit (532 F.2d 916 (1976)) set forth a three-step test for determining the validity of an employer's rule dealing with the confidentiality of wage information. First, it must be determined whether the rule adversely affected employees' Section 7 rights. If it does, the second step shifts the burden to the employer which must establish that the rule was based on "legitimate and substantial business justifications." Even if the employer meets this burden, the third step requires that the Board apply a balancing test to determine whether the employees' Section 7 rights outweigh the employer's business justifications; if they do, the Board shall find that the rule and its application have violated Section 8(a)(1) of the Act.

In *Texas Instruments Incorporated*, 236 NLRB 68 (1978), the Board found that the employer had violated Section 8(a)(3) and (1) of the Act by discharging six employees who, while engaged in organizational leafletting, knowingly distributed material which contained classified wage survey information, including the employer's competitors' wage rates, in violation of an employer rule prohibiting "[d]isclosure of classified material to unauthorized persons." The Board found, *inter alia* , that by so closely connecting its own wage rates to the wage survey's results, and indeed telling employees that their pay compared favorably with what employees elsewhere were receiving, the employer had in effect incorporated the other companies' wage scales into its own and that the employer could not place greater restrictions on discussion or disclosure of other employers' wages than it could place on the discussion of its own wages.

As to the latter restriction, the Board found an 8(a)(1) violation in the employer's policy classifying wage schedules as confidential[10] and thus barring employees from publicizing among any persons other than fellow employees the wage scales (but not their own individual wages) paid by the employer to its own employees. The Administrative Law Judge wrote, page 72:

[10] *Texas Instruments* is unclear as to whether the employer withheld wage information from its own employees. Because of a lack of factual finding, I infer that, unlike the facts herein, the employees knew what their fellow employees were being paid.

> It would be difficult to imagine a substantive subject in the area of conditions of employment more pertinent to self-organizational activities than the wages an employer pays its entire employee complement. If the employees cannot talk about that, to the public, to possible professional union organizers, to anybody on the sidewalk, they are effectively muzzled where it counts most.

Only this part of the Board's order was enforced [*Texas Instruments Incorporated* v. *N.L.R.B.*, 599 F.2d 1067 (1st Cir. 1979)], the court of appeals otherwise noting that the Board never determined the validity of the employer's rule against dissemination of classified material such as the wage survey data and that "the Board must focus on the issues of the validity of the rule invoked by the company to justify the discharges, just as it did in *Jeannette Corp.* v. *N.L.R.B.*," 599 F.2d at 1073.

On remand, the Board [*Texas Instruments Incorporated*, 247 NLRB 253 (1980)], applying the *Jeannette* three-step test,[11] found that the employer's rule adversely affected employees' protected rights, because the employees, while leafletting, were engaged in protected concerted activity, encouraging collective action to improve wages by disclosing otherwise confidential wage data to enforce their argument that only by means of a union could higher wages be assured. Such data, held the Board, was "the type . . . necessary to employees for making an informed decision about unionization." Having determined that the employer's rule adversely affected employees' protected rights, the Board considered the employer's business justifications for the rule and found them wanting, for reasons discussed, *infra*. As a result, the Board found the rule invalid and the discharges based on the rule in violation of Section 8(a)(3) of the Act.

The employer once again petitioned to set aside the Board's Order, and its petition was granted, No. 80-1120 (1st Cir., January 7, 1981). The court of appeals found that the six employees were not engaged in protected concerted activities. The Court, rather than concentrating, as the Board did, on whether employees had a right to disseminate information in furtherance of their organizational goals, directed its attention to the employees' alleged right to distribute the very information they obtained. The court held that the employees had no right under the Act to insist upon receiving access to the employer's wage recommendation reports; that the wage survey report was indeed confidential, having been compiled through the efforts of the employer's officials entirely for limited executive use; and that there was an absence of evidence (assuming that it would be relevant) that the employer's organizing activities were peculiarly dependent upon having access to the confidential information.[12]

It may be argued that the rule herein directly inhibits self-organization[13] more so than that in *Texas Instruments*, where wage data of other companies was withheld, for here is involved Respondent's conscious effort to hold back wage information from all of its employees, including supervisors. As a result, it became impossible for employees to talk about wages, because they know nothing about wages—a result which arguably[14] has "effectively muzzled" discussion leading toward self-organization protection of Section 7 rights.

In this sense, Respondent's rule could have adversely affected employees' rights under Section 7 of the Act, because employees have no access to wage information. But, unless the rule is itself invalid because it forbids distribution and dissemination of wage material that employees are never entitled to in the first place—and no authority has been cited to support this proposition[15]—it seems difficult at best to contend that a valid rule loses its effectiveness once confidential information falls into unintended hands and is knowingly disseminated, despite the knowledge of the employee that he should not have even had it.

In *Bullock's*, 247 NLRB 257, 258 (1980), the Board remanded a proceeding to the Administrative Law Judge for certain additional findings concerning the discharge of an employee for discussion of confidential employee evaluations, stating that if the employee

> . . . had *innocently* obtained the information contained in the employees' evaluations and then discussed them with her fellow employees, her conduct would . . . be both concerted and protected and her discharge, even if based on an honest but mistaken belief that she had wrongfully obtained said evaluations, would be unlawful. However, if [she] had *wrongfully* obtained and copied the reviews herself, her activities would not be protected by the Act and her discharge for engaging in such misconduct would be unlawful.

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[11] It is not clear that the Board adopted the First Circuit's decision as its own, or only as the law of the case. The three-step test was not the Board's, but the Third Circuit's. The General Counsel's brief, however, argues as if the Board accepted the *Jeannette* test as its own, and I so treat the issue herein.

[12] Finding that the employer might nonetheless have invoked its rule for impermissible antiunion purposes, the court assessed the employer's motive and found no illegality under the Act. The General Counsel conceded during the hearing that Respondent's sole motive for warning and discharging Hudson was his violation of its rule regarding confidential documents. There is in the record herein no evidence of disparity, pretext, or any other indicia of animus which the Board had traditionally relied upon to support a finding of an unfair labor practice.

[13] Hudson and BWA were not engaged in self-organization for purposes of collective bargaining. Rather, they were attempting to gather information to determine whether Respondent was racially discriminating against its Black employees and, if so, to bring legal action to redress that wrong. Under ordinary circumstances, the employees were engaged in protected concerted activities. *U. S. Postal Service*, 245 NLRB 901 (1979).

[14] As stated, *supra*, the Court of Appeals for the First Circuit, in its second decision in *Texas Instruments*, noted, without passing on its relevance, the absence of evidence that the employees' organizing activities were "peculiarly dependent upon having access to the confidential information." Because Hudson's and BWA's object was to file a complaint with the Equal Employment Opportunity Commission or to institute a legal action, it is likely that the wage information could be discovered through such proceedings.

[15] It is gainsaid that an employer has no right, under Sec. 8(a)(5) of the Act, to withhold from the collective-bargaining representative of its employees wage information pertaining to the appropriate unit. Here, there is no bargaining representative. The General Counsel's position herein would allow two employees, acting in concert, to request Respondent's wage information and require Respondent to act favorably upon such request.

This appears to be a somewhat different test from that stated by the Board in *Ridgely Manufacturing Company*, 207 NLRB 193, 196–197 (1973), to wit:

> The applicable rule of thumb seems to be that employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association, but are not entitled to their Employer's private or confidential records.

See also *Bell Federal Savings & Loan Association*, 214 NLRB 75, 78 (1974), which limited use of employer information to that which was "openly available" to employees in general.

Whichever test is applicable, I find that Hudson's actions were not protected. Under *Ridgely*, he did not receive Respondent's confidential information in the normal course of his employment. Under *Bullock's*, he neither innocently obtained the information nor innocently discussed it. Unlike *Texas Instruments*, and despite Hudson's protestations to the contrary, Hudson, if not directly responsible for the release of the confidential material, promoted a violation of Respondent's rules. Knowing that the salary information was confidential and that employees could be disciplined if they disseminated such information, he counseled his friends to avoid detection and, once he obtained the information, released it to other employees with full knowledge that he was violating Respondent's rule.

As a result, I find that Hudson's actions were unprotected and conclude that Respondent did not violate Section 8(a)(1) of the Act when it issued a warning to him and subsequently discharged him.

Lest I have erred in this determination, and in order to avoid a remand for additional findings of fact, I should add that I am persuaded that Respondent's rule is justified by business considerations, the second step of the *Jeannette* process. Respondent is one of many companies which operate on a "closed salary" basis. Typically, in most organized companies, there is a collective-bargaining agreement in which employees' wages and scheduled increases are provided. However, even where that is so, many employees, typically higher-paid managerials and professionals, do not know any of their colleagues' salary rates or amount or expected date of an increase. Here, an employee of Respondent knows only what he actually does and what he is presently paid. He does not know even his job title, and where that ranks him in relation to other employees. No general wage schedules are published, and no employee knows (at least from Respondent) what his fellow employees earn. Not only that but increases are not standardized, either by timing or amount. The employee's individual supervisor has broad discretion whether to grant increases, when to grant them, and in what amount. The guidelines are merely that, setting forth broad ranges of salaries for the adequate employee to the exceptional, with suggested timing and amount of increases. A manager may give less or more than that which is recommended.

Respondent contends that there are a number of reasons for its *modus operandi*. In general, it attracts, motivates, and retains the highest calibre of employees. It encourages employees to reach their maximum performance by enabling managers to reward superior employees based on performance alone, and without limiting the amount of financial reward.[16] It inhibits competitors from "stealing" particular employees. It inhibits employee resistance to transfers to other areas of the country. The General Counsel attempts to impugn these objectives, but it is unnecessary to answer each point specifically. It should be sufficient to say that the Board may not substitute its business judgment for that of Respondent, merely because it may be arguable that another approach is equally sound. On the other hand, a specious argument may be subject to attack if, by reason of other evidence, Respondent's alleged justification is patently false. For example, in *Texas Instruments*, the allegedly confidential information had already been distributed by the employer to its competitors, leaving no substance to the employer's argument that the employees could not distribute certain information because it would permit its competitors to know of the same data. Here, with one possible exception, which I find was solely by inadvertence,[17] Respondent never revealed to any of its competitors the current information of recommended salary percentage increases and timing thereof, as was distributed by Hudson;[18] and the information supplied was so general that it could not have been useful to Respondent's competitors for recruitment purposes.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[19]

The General Counsel's Exhibits 5–7, 9, 26, 29, and 30–36 and Respondent's Exhibits 3, 4, and 6 are to be main-

[16] Respondent has facilities not only in the United States, but also overseas. In Germany and France, where governmental policies require openness of salaries, Respondent's experience has demonstrated that managers, because of employee pressure, have not been able to exercise their discretion in granting increases as have those in the United States; and the spread of salaries between the satisfactory and superior performers is approximately two-thirds less than that in the United States.

[17] A document given erroneously in one of the surveys in which Respondent participated did not set forth the timing of increases or how the increases were to be calculated. The number of the levels described was far less than that revealed by Hudson.

[18] In another survey, an estimate of the probable movement of Respondent's rate ranges was supplied to other companies. This was, however, more akin to an economist's prediction and was, in fact, incorrect for 11 of 12 years. Further, the estimate was a general one to be applied to all of Respondent's employees, rather than to each level or position of employment.

[19] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

tained under seal, subject to examination by the Board and any reviewing court of appeals, and all parties to this proceeding are directed not to disclose the contents of said Exhibits;[20] and it is further ordered that the complaint herein is hereby dismissed in its entirety.

[20] During the course of the hearing, I granted, upon consent all parties, Respondent's request to place under seal certain confidential documents received in evidence and directed that the parties not disclose their contents. The Order herein merely continues in effect that direction.